IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1941

No.....

ARTHUR T. LELLES, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

POINT I.

The Circuit Court of Appeals in affirming the judgment of the trial court did not give proper effect to an applicable decision of this Court and has decided a federal question in a way probably in conflict with applicable decisions of this Court.

It is petitioner's contention that the Circuit Court of Appeals did not follow and give proper effect to the decision of this Court in the case of *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94, 23 Sup.

Ct. 33, 47 L. Ed. 90. That was a case wherein the postoffice department refused to allow the petitioner the right to use the mails. Briefly, the facts were that in and about their business they carried on and conducted not only the treatment of people afflicted with ills at their establishment but also engaged in the business of teaching and educating others in the practical science of healing and that a large amount of their business consisted of treatments by mail and advice to people throughout the United States and foreign countries, using the mails for such purpose. Complaints by many treated had been made to the postal authorities against the Healing School. Many were cured of ills and believed in the treatment accorded. Quoting briefly from page 107 of the opinion, the Court says:

> *"It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all, it is, in each case, opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved, as matter of fact, that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and as, in our opinion, it is used in these statutes."*

The petitioner in his evidence (R. 408-494, Vol. I and 495-583, Vol. II) submitted to the trial court and jury evidence that he was engaged in the business of dealing in fresh, canned and dried mushrooms at wholesale and retail and had been so engaged for a great many years before he filed his trade-name in 1937, and also that he was engaged in the business of supplying mushroom growing outfits including spawn and Amco Fertilizer, thermometers for testing mushrooms, and manuals of instruction for mushroom culture under the name of Washington Mushroom Industries. The Government in its case called about one hundred witnesses out of some six thousand patrons who testified that they did not or could not raise mushrooms, many of whom blamed themselves for not following instructions such as in preparing the proper mushroom beds, compost, improper air, too much water applied, and numerous other excuses. The defendant called some fifty witnesses who testified that they followed the instructions and were successful in growing mushrooms. In each case the witnesses usually gave their opinion of the defendant's business, either favorable or unfavorable, and at the conclusion of the trial the court permitted the jury to decide between the opinions of the two groups, contrary to the decision of this Court in the *McAnnulty* case, *supra*. The defendant testified that he had used the mails over a period of many years in correspondence, by letters and circulars as well as the parcel post in connection with his business of mushroom culture. He testified that he had an office, factory and warehouse in Seattle. The Government did not contradict him in any way by

any testimony that he had not been in business during the time that he said he was so engaged, and did not contradict him as to his office and factory except to belittle the size of the same before the jury. The principal complaint of the Government was that he had been engaged in exaggeration of his literature advertising his business. It is our contention as we will show by some authorities cited below, that exaggerating or "puffing" one's business does not bring the matter within the section of the Criminal Code complained of in using the mails to promote frauds.

Can it be said that under the rule announced in the *McAnnulty* case that a man could be prosecuted for conducting a business where A says that he could not raise mushrooms under the directions of the petitioner while B says that he followed the same directions and did raise mushrooms? Does it not come squarely within the spirit and letter of the decision of this Court in the *McAnnulty* case which refuses to permit the Circuit Court to hold that petitioner can be prosecuted for using the mails to defraud where the matter is purely one of opinion?

POINT II.

The Circuit Court of Appeals in affirming the judgment of the trial court has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on similar matters covered by said section of the Criminal Code involved in this case.

For brevity in this brief we will discuss Points II, III and IV together.

The decision of the Ninth Circuit Court of Appeals in this case is not in harmony with the decisions of other

Circuit Courts construing the statute of using the mails to defraud. One of the best decisions interpreting the meaning and intent of the statute is to be found in *Harrison vs. United States,* 200 Fed. 662. There Judge Denison, speaking for the Court, says:

> *"The statute makes it a crime—a felony—to use the mails in promoting a 'scheme to defraud.' This statute has received consideration, definition, and application in a great number of decided cases—among others, by the Supreme Court in* Durland vs. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, *and* U. S. vs. Stever, 222 U. S. 167, 32 Sup. Ct. 51, 56 L. Ed. 145, *and by this court in the cases of* Milby, 109 Fed. 638, 48 C. C. A. 574, Horman, 116 Fed. 350, 53 C. C. A. 570, O'Hara, 129 Fed. 551, 64 C. C. A. 81, Bartholomew, 177 Fed. 902; 101 C. C. A. 182, *and* Foster, 178 Fed. 165, 101 C. C. A. 485. *It is by the decisions settled, not as an all-inclusive definition, but as one sufficient for the purposes of this case, that the statutory 'scheme to defraud' may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange; and this deception may, of course, be by implication as well as by express words. On the other hand, the 'scheme' cannot be found in any mere expression of honest opinion as to quality or as to future performance. There must be the underlying intent to defraud.* Rudd vs. U. S. (C. C. A. 8) 173 Fed. 912, 97 C. C. A. 422; Brown vs. U. S. (C. C. A. 8) 146 Fed. 219, 76 C. C. A. 577. *It is true that the Durland case contemplates as within the statute 'suggestions and opinions as to the future'; but necessary limitations on a too broad*

construction of this language are indicated in the Mc-Annulty case, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90.

"As it arises in the present case, the question is: When does the not uncommon exaggeration of advertising become sufficient evidence of an intent to defraud? Can a business man, selling an article of merit and of value and at a fair price, be convicted of a scheme to defraud, because his advertising overstates the capacity and usefulness of the article? If so, where is the line to be drawn? And this brings us to the further question: How far are United States courts and juries to become censors of the advertising of manufacturers or dealers? This question stands out for answer, because nearly all business is now aided by advertisements passing through the mails, and on every hand we see claims of capacity, performance, and results which we know cannot stand cross-examination.

"On what we think an exhaustive review of all the reported cases arising under this statute, we do not find any one which seems, on its face, to be of the class we have mentioned — exaggerated claims of merits in articles of inherent utility — unless it is Faulkner vs. U. S., 157 Fed. 840, 85 C. C. A. 204, *in which the Circuit Court of Appeals in the Fifth Circuit reversed a conviction because based merely on exaggerated advertising. The subject is also considered by Judge Severens, then District Judge, who said, in* U. S. vs. Staples (D. C.) 45 Fed. 195, 198:

" 'Parties who have anything to sell have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course

of business to exaggerate the merits of goods people have to sell, and within any proper, reasonable bounds such a practice is not criminal. It must amount to some substantial deception, in order to be subject to cognizance by the courts.'

"The 'schemes' which have been punished have all smacked of the confidence game, of getting something for nothing, like selling worthless corporate stock (Wilson vs. U. S. (C. C. A. 2) 190 Fed. 427, 111 C. C. A. 231); *running a bucket shop under the pretense of doing real trading* (Foster vs. U. S. (C. C. A. 6) 178 Fed. 165, 101 C. C. A. 485); *running a 'fake' marriage bureau* (Grey vs. U. S. (C. C. A. 7) 172 Fed. 101, 96 C. C. A. 415); *getting consignments without intent to remit* (McConkey vs. U. S. (C. C. A. 8) 171 Fed. 829, 96 C. C. A. 501); *financial schemes impossible of performance* (Walker vs. U. S. (C. C. A. 9) 152 Fed. 111, 81 C. C. A. 329); *and the like. Schemes like those discussed in* Harris vs. Rosenberger (C. C. A. 8) 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762, *and in the cases it reviews, fall in this same class, because though the representation affects quality or performance. it directly pertains to a fact or a plan inherent in the substantial identity—the essential characteristics—of the thing itself; and even though the original and underlying business is legitimate, the use being made of it is fraudulent."*

It is our contention that the Congress in passing this Act to prevent the fraudulent use of the mails never intended to cover the complaints of dissatisfied customers in any line of legitimate business. If it did cover such, there is not a merchant or dealer in any line of legitimate busi-

ness who would not be subject to prosecution because of dissatisfied customers.

The Federal Reports have many cases emphasizing this particular point, the gist of the decisions being that the trial court should not permit a jury in a criminal case from deciding between satisfied and dissatisfied customers in determining a criminal intent to defraud. In *McLendon vs. U. S.*, 2 Fed. (2d) 660, the Sixth Circuit Court says:

> "The fact that one conducting a legitimate business, in part through the mails, sometimes defrauds his customers by misrepresenting his goods, does not make his business a scheme to defraud within this section."

The charge in the indictment that the petitioner was representing himself as engaged in the business of dealing in fresh, canned and dried mushrooms at wholesale and retail, and also engaged in the business of supplying mushroom growing outfits, including spawn, Amco Fertilizer, thermometers for testing mushrooms and manuals of instructions for mushroom culture under the name of Washington Mushroom Industries, was testified to in detail by the petitioner (R. 408, Vol. I). The uncontradicted evidence in the case shows that he was so engaged from 1933 to the time of the indictment in December, 1939 (R. 410, Vol. I), which evidence also shows that his was the only business of its kind buying mushroom products from his customers. A great deal of his literature that he sent to his patrons was taken from circulars sent out by the Department of Agriculture of the Government, as well as from a number of recognized mushroom com-

panies, all of which literature claimed that the growing of mushrooms was a simple process if the instructions were properly followed. He did purchase and promptly paid cash for all mushrooms received by his company. The charges in the indictment at best only charge the defendant with exaggeration and "puffing."

The Ninth Circuit Court in its decision did not follow and it is inconsistent with the decision of the Fifth Circuit Court in the case of *Faulkner vs. U. S.*, 157 Fed. 840. In that case Judge Shelby speaking for the court says:

> "Conceding that the scheme is sufficiently charged, there must be proof of it before the plaintiff in error could be rightfully convicted. The evidence shows without conflict that Faulkner was in fact engaged in business as advertised by him. He had, in fact, a large business. There was uncontradicted evidence that he had made arrangements to secure and had secured a 'cold storage' place for perishable foods. There was conflict in the evidence as to the size of the place, but that seems to us immaterial. The fact is he was simply advertising his business, and, if the advertisement contains some exaggerations, that does not constitute a scheme to defraud. It was shown that he failed to settle with some few of his patrons, and he offered to prove that he settled with large numbers of those who placed products in his hands for sale. The fact that one who advertises a business fails to make settlements with some of his creditors, the advertisements being substantially true, does not sufficiently tend to show a scheme or artifice to defraud to make it a question to be submitted to the jury. If the plaintiff in error is guilty of embezzlement, he may be

prosecuted for that offense under the laws of the state.

"After a close examination of all the evidence, which it would be entirely useless to copy into this opinion, we have reached the conclusion that there was no sufficient evidence before the jury to authorize the defendant's conviction of the offense charged. The charge requested by the plaintiff in error, directing the jury to acquit him, should have been given.

"The judgment of conviction is reversed, and the cause remanded for a new trial."

This *Faulkner* case is on all fours with the facts in the case at bar. The petitioner, Lelles, had a large business, running over six or seven years with an office, factory and warehouse, filling orders, buying mushrooms and trying to encourage the mushroom culture throughout the West and other parts of the country. We contend that the Ninth Circuit Court in deciding this case should have followed the decision in the *Faulkner* case. The decision of the Ninth Circuit Court is in conflict with the decisions of the Fifth and Sixth Circuit Courts as well as some of the others which have passed upon the statute of using the mails to defraud. This is an important question of general law which should be definitely settled by decision of the Supreme Court so that all business men engaged in a legitimate business would feel that their business is safe from the complaint of dissatisfied customers.

We ask the Court in deciding this petition for a writ to find one single statement of evidence in the record that contradicts the defendant that he was conducting a large

business of selling mushroom spawn and his Amco Fertilizer and purchasing mushrooms, paying cash promptly upon receipt of the same.

By granting the writ prayed for herein, we respectfully represent to the Court that we will be able to show that the petitioner was not violating the criminal statute menioned in the indictment.

CONCLUSION

WHEREFORE your petitioner respectfully prays that writ of certiorari be issued out of and under the Seal of this Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case, and that the said decision and judgment of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and your petitioner may have such other and further relief in the premises as this Court may deem meet and just.

ARTHUR T. LELLES,
Petitioner

By WILLIAM A. GILMORE,
Attorney for Petitioner.

(Appendix follows)